International Law Studies – Volume 1

International Law Situations with Solutions and Notes

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SITUATION II.

Sulphur, which is obtained chiefly from Sicily, is used in the manufacture of powder; it is also used, very largely, in the manufacture of paper from wood pulp and in other mechanical arts. On the understanding that it may, because of the former use, be treated as contraband, the Sicilian merchants, in the case of war between the United States and another power, cease to send it to the United States ports, but ship it by Italian vessels to merchants in Quebec, from whom the American manufacturers of powder as well as of other articles, obtain their supplies, by railway.

Should the vessel in question be seized?

SOLUTION.

"The tendency of all recent authorities * * * goes to show that contraband or not contraband of war is a question of evidence to be determined in each case by reference, not to one particular rule of law, but many; not to any one fact, however strong that may be, but to all the circumstances connected with the goods in question. It is not only, or not so much, whether the goods are * * * capable of being applied to military or naval use, but whether, from all the circumstances connected with them, those very goods are or are not destined for such use."[1]

We must, therefore, consider (1) the nature of the goods; (2) their origin and ownership; (3) their destination.

1. *Nature of the goods.*—According to the usual classification, derived from Grotius, articles of merchandise are divided with reference to the question of contraband as follows:

1. Those manufactured and primarily and ordinarily used for military purposes in time of war.

2. Those that may be and are used for purposes of war or of peace, according to circumstances.

[1] Moseley on Contraband of War, 9.

3. Those exclusively used for peaceful purposes.

"Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent, while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or seige."[1]

With respect to sulphur and saltpetre, "there is much difficulty in deciding whether they come within the definition of ammunition, so as to render them liable, in the first degree, as to all the consequences of such. * * * As things clearly of a doubtful or double use, however much they may be required for and specially adapted for war, it is, no doubt, better to consider them as of the second class of contraband where no treaty exists, and to render them liable to confiscation, to require some other proof, which for such goods need not be very strong, of a warlike destination."[2]

In this relation is to be observed that the importance of sulphur, as an element entering into explosives, has lately declined, while its use in the arts has become more extensive.

In the Instructions to Blockading Vessels and Cruisers, issued by the Navy Department during the war with Spain, certain articles are classed as "absolutely contraband" and certain others as "conditionally contraband." Among the former is included saltpetre, but sulphur is omitted from both lists, and apparently intentionally so. Nor is it included among contraband articles, either absolute or conditional, in the present Naval War Code.

In the royal decree of Spain, of April 23, 1898, sulphur was included in the list of contraband; but it appears that the Spanish Government, upon the request of the Italian Government, afterwards announced its suspension from that category.

2. *Origin and ownership.*—Special consideration has been shown in times past to the natural produce of a neutral country, shipped by and belonging to its nationals.

[1] Chase, C. J., in the case of The *Peterhoff*, 5 Wallace, 28, 58.

[2] Moseley, 47, 48.

This consideration is founded on the principle "that the people of such a country are not needlessly to be deprived of a fair and usual market for their produce;" and "so strong is the rule that, even though it [the produce] be of the nature of contraband in the first degree, in some few specified instances it will be protected." And still more strongly will favorable consideration be justified in respect of articles of a "less degree of contraband."[1]

3. *Destination.*—In various cases that arose during the civil war, it was held by the courts of the United States that goods, although they might be proceeding to a neutral port, were liable to seizure and confiscation as contraband, or for breach of blockade, as the case might be, if they were, at the time of capture, in reality intended, not to be delivered and sold in the neutral market, but to be continuously carried on from their *colorable* destination, by the same or another vessel, or by means of inland transit, to the enemy. These decisions were acquiesced in by the British Government as being in harmony with the precedents in its prize courts. On the other hand, the American courts repeatedly declared that the goods, if *bona fide* intended for sale in the neutral market, were not subject to capture.[2]

Of the belligerent destination, where a "continuous voyage" is alleged, there should be some definite evidence. It has been said that the evidence must be "full and clear;" but, in determining what evidence may satisfy this requirement, it may be proper to bear in mind the doctrine laid down by the same writer, that "in the administration of all law, international as well as municipal, realities and not shams are to be regarded."[3] But, "there seems to be but little question that the evidence as to the destination of the cargo should be definite. A mere presumption should not be sufficient."[4]

Conclusion.—Since sulphur may be considered as only conditionally contraband, and since it is, in the case stated, the natural produce of the country from which it is shipped, and is consigned to merchants in a neutral port, the pre-

[1] Moseley, 11–15.

[2] See the Introduction to Lushington's Manual of Naval Prize Law.

[3] Creasy, First Platform of International Law, 624, 625.

[4] Snow, Int. Law, 157.

sumption is in favor of the innocent character of the cargo. But if there is reasonable ground to believe that it is not to be sold in the neutral market, but that it has been purchased on American account and is to be reshipped to the United States and there used for warlike purposes, the vessel should be seized. The evidence on these points, whether such evidence be found in statements or in defects in the papers, or in the testimony of persons on board, should be substantial, though not necessarily conclusive, to justify the capture.

Due regard must of course be paid to any existing treaty stipulations.

NOTES ON SITUATION II.

I. *Spain's action as to sulphur.*—April 29, 1898, the Italian ambassador at Madrid was orally advised that instructions had been issued to Spanish naval officers temporarily to suspend, in regard to sulphur, the application of the royal decree of April 23, concerning contraband of war. This resolution was confirmed by a note of May 31, 1898, the Spanish Government reserving the right to restore sulphur to the contraband list, should its interests require it, but promising not to do so without sufficient notice, so that pending contracts might be performed. The Italian ambassador replied June 3, 1898, accepting the notification of Spain's resolution, but expressly reserving the question of principle. It was understood to be the opinion of the Italian Government that sulphur could not properly be considered as contraband of war, since it was used in many innocent arts and had ceased to be an ingredient of the higher class of gunpowders.[1]

June 8, 1898, there appeared in the official Imperial Gazette, at Berlin, an announcement that the Spanish ambassador had informed the German Government that sulphur, which had been included in the royal decree of April 23 as contraband of war, was no longer to be so considered.[2]

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[1] Mr. Draper, United States ambassador at Rome, to Mr. Day, Secretary of State, June 9, 1898; Mr. Iddings United States chargé d'affairs *ad int.* at Rome, to Mr. Day, July 16, 1898. (MSS. Department of State.)

[2] Mr. White, United States ambassador, to Mr. Day, June 11, 1898. (MSS. Department of State.)

II. *Decisions of the United States courts during the civil war as to the question of "continuous voyages."*—Early in the war the Confederate Government, whose ports were blockaded by the United States, sent abroad agents for the purpose, among others, of obtaining arms and munitions of war and other needful supplies, as well as vessels to transport them, the means of payment to be derived chiefly from the proceeds of the Southern cotton crop. To carry out this plan a firm under the name of Frazer, Trenholm & Co., composed of merchants of Charleston, South Carolina, and constituting a branch of a house in that city, was established in Liverpool. Consignments of cotton were made to this firm, to be drawn against for purchases for the Confederacy.[1] In this way a vast system of blockade running was soon built up, under cover of the neutral flag, but under actual Confederate supervision and control. Commander Bulloch, C. S. N., writing at Liverpool, May 3, 1862, to Mr. Mason, Confederate commissioner in London, stated that he had read to Messrs. Frazer, Trenholm & Co. a part of one of Mr. Mason's letters, and added: "These gentlemen say that their ships are necessarily sailed under the British flag, and the presence on board of any persons known to have been in the Confederate service would compromise their character, and in this view of the case they feel reluctantly compelled to decline giving a passage to any of the *Sumter's* men."[2]

As the system of blockade running grew in notoriety it became more difficult of execution, and Confederate agents were established in the various West India islands to facilitate its operations; and, instead of direct voyages to blockaded ports, goods were shipped in British bottoms to neutral ports and there transshipped into steamers of light draft and great speed, which could carry coal enough for the short passage to Charleston, Savannah, or Wilmington. Of the neutral ports thus used, Nassau, in the island of New Providence, acquired the greatest celebrity.[3]

July 5, 1862, Mr. A. H. Layard, by direction of Earl Russell, addressed a letter to certain British merchants

[1] Moore, Int. Arbitrations, I, 580.

[2] Official Records of the Union and Confederate Navies, Ser. I, vol. 1, p. 770.

[3] Int. Arbitrations, I. 581.

and shipowners of Liverpool in reply to a memorial in which they invoked the protection of the British Government against "the hostile attitude assumed by Federal cruisers in the Bahama waters," so as to put a check on the seizures frequently made therein. Earl Russell, in his reply, stated that complaint had, on the other hand, been made on the part of the United States that ships had been sent out from Great Britain to America "with a fixed purpose to run the blockade; that high premiums of insurance have been paid with this view, and that arms and ammunition have been thus conveyed to the Southern States to enable them to carry on the war. Lord Russell," so the letter continues, "was unable either to deny the truth of those allegations or to prosecute to conviction the parties engaged in those transactions. But he can not be suprised that the cruisers of the United States should watch with vigilance a port which is said to be the great entrêpot of this commerce.

"Her Majesty's Government have no reason to doubt the equity and adherence to legal requirements of the United States prize courts. But he is aware that many vessels are subject to harsh treatment, and that, if captured, the loss to the merchant is far from being compensated even by a favorable decision in a prize court.

"The true remedy would be that the merchants and shipowners of Liverpool should refrain from this species of trade. It exposes innocent commerce to vexatious detention and search by American cruisers; it produces irritation and ill will on the part of the population of the Northern States of America; it is contrary to the spirit of Her Majesty's proclamation, and it exposes the British name to suspicions of bad faith, to which neither Her Majesty's Government nor the great body of the nation are justly obnoxious.

"It is true, indeed, that supplies of arms and ammunition have been sent to the Federals equally in contravention of that neutrality which Her Majesty has proclaimed. It is true, also, that the Federals obtain more freely and more easily that of which they stand in need. But if the Confederates had the command of the sea they would no doubt watch as vigilantly and capture as readily British vessels going to New York as the Federals now watch

Charleston and capture vessels seeking to break the blockade.

"There can be no doubt that the watchfulness exercised by Federal cruisers to prevent supplies reaching the Confederates by sea will occasionally lead to vexatious visits of merchant ships not engaged in any pursuit to which the Federals can properly object. This, however, is an evil to which war on the ocean is liable to expose neutral commerce, and Her Majesty's Government have done all they can fairly do—that is to say, they have urged the Federal Government to enjoin upon their naval officers greater caution in the exercise of their belligerent rights.

"Her Majesty's Government having represented to the United States Government every case in which they were justified in interfering, have only further to observe that it is the duty of Her Majesty's subjects to conform to Her Majesty's proclamation, and to abstain from furnishing to either of the belligerent parties any of the means of war which are prohibited to be furnished by that proclamation."[1]

Early in August, 1862, Mr. Stuart, British chargé d' affaires *ad interim*, represented to Mr. Seward, on the strength of information received from British naval officers, that a British steamer had been chased and fired on by a United States cruiser without display of her colors, and had then been captured without any search, and that the senior United States naval officer present had declared that the American cruisers had orders to seize any British vessels whose names had been forwarded to them from the Government at Washington. Mr. Stuart protested against these instructions as being "entirely at variance with the recognized principles of international law." On the 9th of August Mr. Seward communicated to Mr. Stuart a copy of a letter which he had addressed on the preceding day to Mr. Welles, Secretary of the Navy, conveying the direction of the President that certain instructions, which were set forth in the letter, should be issued to naval officers.[2] Instructions were issued by Mr. Welles August 18, 1862. They embodied the substance of Mr. Seward's draft with certain amendments. They contained the following clauses:

[1] Dip. Cor., 1862, 171.

[2] Blue Book, North America, No. 5 (1863).

"First. That you will exercise constant vigilance to prevent supplies of arms, munitions, and contraband of war from being conveyed to the insurgents, but that under no circumstances will you seize any vessel within the waters of a friendly nation.

"Secondly. That, while diligently exercising the right of visitation on all suspected vessels, you are in no case authorized to chase and fire at a foreign vessel without showing your colors and giving her the customary preliminary notice of a desire to speak and visit her.

"Thirdly. That when that visit is made the vessel is not then to be seized without a search carefully made, so far as to render it reasonable to believe that she is engaged in carrying contraband of war for or to the insurgents, and to their ports directly or indirectly by transshipment, or otherwise violating the blockade; and that if, after visitation and search, it shall appear to your satisfaction that she is in good faith and without contraband, actually bound and passing from one friendly or so-called neutral port to another, and not bound or proceeding to or from a port in the possession of the insurgents, then she can not be lawfully seized. * * *

"You are specially informed that the fact that a suspicious vessel has been indicated to you as cruising in any limit which has been prescribed by this Department does not in any way authorize you to depart from the practice of rules of visitation, search, and capture prescribed by the law of nations."[1]

Diligent watch was kept by the United States consuls in English ports for vessels believed to be engaged in contraband and blockade-running ventures. December 30, 1862, Mr. Adams, United States minister at London, communicated to Earl Russell two lists, respectively furnished by the consuls at Liverpool and London, of vessels which, as Mr. Adams said, were believed to have "left with supplies, principally contraband of war, with the intention of either running the blockade directly or of going to a neighboring Atlantic or Gulf port and there discharging their cargoes into another class of vessels, the more easily to get such cargoes to their places of destination." In these lists, which contained the names of 82 vessels, were the steamers *Bermuda*, *Circassian*, *Gertrude*, *Labuan*, *Pearl*, and

[1] Official Records of the Union and Confederate Navies, Ser. I, vol. 1, p. 417.

Peterhoff, and the sailing vessels *Springbok* and *Stephen Hart*.[1]

Case of the Dolphin.—The first judicial application during the civil war of the doctrine of continuous voyages was made by Judge Marvin, of the district court of the United States for the southern district of Florida, in the case of the *Dolphin*, a steamer of 129 tons net, of apparent British ownership. She was captured March 25, 1863, at 5.15 o'clock a. m., by Lieut. Commander Fleming, of the U. S. S. *Wachusett*, between the islands of Culebra and Porto Rico, while ostensibly on a voyage from Liverpool to Nassau.[2] The *Dolphin* left St. Thomas just after midnight on March 25. The *Wachusett* followed her but lost her in the night; descried her again at daylight, and captured her after an hour and a half's chase and the firing of a number of shots. In his first brief report, March 25, Commander Fleming said: "Suspicion being strong against her I seized her." In a further report, of March 28, he said that the report of the boarding officer, "together with an examination I had of her papers, and the strong suspicion attached to her of intending to run the blockade, induced me to capture her and to send her to Key West.[3]

When sent before the prize court, the vessel and cargo were claimed by one Grazebrook, of Liverpool, to whose order the bills of lading consigned the cargo, while the freight bill consigned it to Messrs. Chambers & Raw, of Nassau. It corresponded to the freight list found on board, except as to certain cases containing in all 920 rifles and 2,240 cavalry swords, which were described as "hardware."

Judge Marvin said that if the vessel and cargo were owned as claimed and "there was no intention on the part of the owner that the vessel should proceed with the cargo to a port of the enemy" there would be no justification for the capture or condemnation of either; but that "if, on the other hand, it was the intention of the owner that the vessel should simply touch at Nassau and should proceed thence to Charleston or some other port of the enemy, then the voyage was not a voyage prosecuted by a neutral

[1] Blue Book, North America, No. 3 (1863), 29, 34, 35.

[2] The Dolphin (May, 1863), 7 Fed. Cases, 868.

[3] Official Records of the Union and Confederate Navies, Ser. I, vol. 2, pp. 135, 136. The *Dolphin* was "on the list," and had been under observation for several days. (Id., 131.)

from one neutral port to another, but was a voyage to a port of the enemy, begun and carried on in violation of the belligerent rights of the United States to blockade the enemy's ports and prevent the introduction of munitions of war. . . . The cutting up of a continuous voyage into several parts by the intervention or proposed intervention of several intermediate ports may render it the more difficult for cruisers and prize courts to determine where the ultimate terminus is intended to be, but it can not make a voyage which in its nature is one to become two or more voyages, nor make any of the parts of one entire voyage to become legal which would be illegal if not so divided."

The master and some of the crew swore that Nassau was the terminus of the voyage. Three letters, however, were found on board, all signed by Grazebrook. One of them, addressed to Chambers & Raw, suggested that if the market at Nassau was "overdone from New York and the States," or if the "French charter" for "army stores, rum, etc.," had fallen through, a "fine trade" might be done "between Nassau and Boston and New York," and a "return cargo" of coal might be brought from Prince Edward Island for blockade runners; or perhaps the steamer might be sold, but not for any of "your Federal or Confederate paper," but only for "hard cash." Another letter, addressed to the master, was of similar purport. The third, which evidently was not intended to be shown to visiting cruisers, and the contents of which were unknown to the master, was addressed to Chambers & Raw. It canceled the prior instructions, which were said to have been given "for a certain reason;" declared that the vessel "of course" was "not to be sold to anyone;" stated that "a power of attorney, for certain purposes," would be sent to the firm by the next mail, and expressed the hope that they would "be able to get some more goods on, instead of taking any off, and at good rates."

Commenting upon the evidence, Judge Marvin observed—

1. That Nassau furnished no market for such a cargo as that of the *Dolphin*. "It is," he said, "a small town. The adjacent islands possess but a small population, dependent on it for supplies. Probably not three merchant steamers ever arrived at that port from any part of the

world until after the present blockade was established, except the regular Government mail steamers. Was her cargo to be sold in Nassau, including the 920 rifles and the 2,240 swords? These are questions which it is not unreasonable that a prize court should ask and expect some reasonable explanation of in a case like this."

2. That it appeared that Mr. Grazebrook did not intend that the vessel should be sold at Nassau or that her voyage should end there. "She was," said Judge Marvin, "to go from Nassau somewhere. More goods were to be put on, instead of taking any off. The studied effort to conceal the ulterior destination; the swords and rifles found on board, and denominated 'hardware;' the almost certain impossibility of employing a steamer of this class and size in any trade in this part of the world by which she could earn even her expenses, other than in the trade and business of violating the blockade; all point with unerring certainty to Charleston or Wilmington as the ulterior destination of the vessel and cargo."

Both were accordingly condemned;[1] and no appeal was taken.

Case of the Pearl.—May 6, 1863, Judge Marvin decided the case of the *Pearl*.[2] This vessel, a small steamer of 72.17 tons net, was captured by the U. S. S. *Tioga*, January 20, 1863, about 60 or 70 miles from Nassau, while ostensibly on a voyage from Liverpool to that port. A claim to the vessel was made by the master on behalf of one Wigg, a merchant of Liverpool, and to the cargo, on behalf of H. Adderly & Co., of Nassau.

In deciding the case, Judge Marvin observed that he had already held, in the case of the *Dolphin*, "that a vessel bound on a voyage from Liverpool to Nassau, with an intention of touching only at the latter port, and of proceeding thence to a blockaded port of the enemy, is engaged in an attempt to violate the blockade, which subjects her to capture in the antecedent as well as in the

[1] Judge Marvin in the course of his opinion cited The *Columbia*, 1 C. Rob., 154; The *Neptunus*, 2 C. Rob., 110; The *Imina*, 3 C. Rob., 167; The *Maria*, 5 C. Rob., 365; The *William*, 5 C. Rob., 385; The *Richmond*, 5 C. Rob., 325; The *Thomyris*, Edwards's Adm., 17; The *Odin*, 1 C. Rob., 252.

[2] 19 Fed. Cases, 54

ultimate stage of the voyage—before arriving at Nassau as well as after having left that port. I think the law also is that if an owner sends his vessel to a neutral port, with a settled intention to commence from such a port a series of voyages to a blockaded port, he thereby commences to violate the blockade, and subjects his vessel to capture, notwithstanding he may also intend to unlade the vessel at the neutral port, discharge the crew, and give all other external manifestations of an intention to end the voyage at such port. Where a deliberate purpose exists to violate a blockade, and measures are actually taken to accomplish that object, the law couples the act and the intent together and declares the offense to be complete. The resorting, therefore, to a neutral port for the purpose of the better disguising the intention, or of procuring a pilot for the blockaded port, or of perfecting the arrangements so as to increase the chances of a successful violation of the blockaded port, will not, in the least, extenuate the offense or avoid the penalty. These measures may increase the difficulty of discovering the true intention, but whenever it is discovered it will give to the transaction its true legal character."[1]

The bill of lading stated that the cargo was shipped by Wigg to be delivered to Adderly & Co. No letter of advice, nor any invoice, was found among the papers; and seven members of the crew concurred in the understanding that they were engaged in a blockade-running venture. Nevertheless, as the vessel when captured was really going from one neutral port to another, Judge Marvin stated that he was unwilling to pronounce a condemnation without affording the claimants all the facilities they might desire for rebutting the presumption that they were engaged in an unlawful enterprise. He therefore ordered that the claimant of the vessel "be allowed to produce further evidence, by his own oath and otherwise, touching his interest therein, and the use he intended at the time of capture to make of the vessel after her arrival at Nassau.

[1]Citing The *Columbia*, 1 C. Rob., 154; The *Neptunus*, 2 C. Rob., 110; Yeaton *v.* Fry, 5 Cranch, 335; The *Richmond*, 5 C. Rob., 325; The *Maria*, id., 365; The *William*, id., 385.

the trade or business he intended she should be engaged in, and for what purpose she was going to that port; and that the claimant of the goods have time to procure an affidavit of his right and title thereto, and to produce such other proof of neutral ownership as he may be advised."

No new evidence was taken under this order; but the court, on a further hearing, probably influenced by the fact that the cargo consisted of 10 bales of cloth and ready-made clothing, and contained nothing distinctively pointing to a belligerent destination, decreed restitution of the vessel and cargo, on payment by the claimants of expenses and costs.[1]

The Supreme Court reversed this decree, and condemned both ship and cargo. In pronouncing sentence as to the vessel, the following grounds were mentioned:

The fact that the firm of H. Adderly & Co. had become well known in the court as largely engaged in the business of blockade running; the testimony of the crew as to the Confederate destination of the vessel; the failure to take new evidence on the order for further proof; the absence from Wigg's affidavit, produced on the motion for further proof, of any statement as to the use intended to be made of the vessel after her arrival at Nassau, or as to the purpose for which she was going thither; and the defective and suspicious character of other testimony for the claimant. The court declared itself satisfied that the vessel "was destined, either immediately after touching at that port [Nassau] or as soon as practicable after needed repairs, for one of the ports of the blockaded coast."

As to the cargo, it was observed that the evidence showed ownership in Wigg rather than in any other person, but that no claim was put in by him. The master put in a claim for Adderly & Co., but in his deposition disclaimed all knowledge of ownership, except from the consignment; and the neglect of the firm to put in an affidavit of title or neutral ownership, under the order for further proof, could not, said the court, be construed otherwise than as

[1] The *Pearl*, 5 Wallace, 574.

an admission that they were not entitled to restitution. The cargo was therefore condemned with the ship.[1]

Case of the Stephen Hart.—The doctrine of continuous voyages was next judicially discussed by Judge Betts, of the United States district court for the southern district of New York, in a series of cases of which we may take, as the leading example, that of the *Stephen Hart*, condemned July 30, 1863.[2] On the same day Judge Betts rendered similar sentences in the cases of the *Springbok* and the *Peterhoff*, which will be noticed hereafter, the case of the *Gertrude*, which will also be mentioned in association with them, having been disposed of by a sentence of condemnation previously in the same month.[3]

The *Stephen Hart* was captured January 29, 1862, by the U. S. S. *Supply*, off the southern coast of Florida, about 25 miles from Key West and 82 miles from Point de Yeacos, in Cuba. The vessel was claimed by one Harris, a British subject, and the cargo by the firm of Isaac, Campbell & Co., of London. The cargo consisted of arms, ammunition, and military clothing. The vessel was bound ostensibly to Cardenas, in Cuba. There were found on board, at the time of her capture, her register and sundry bills, certificates, telegrams, and letters, a clearance, two log books, a copy of the United States Coast Survey for 1856, and various other papers, but no invoices, no bills of lading,

[1] The *Pearl* (1866), 5 Wall., 574.

[2] Blatchford's Prize Cases, 387.

[3] The *Gertrude*, an English iron screw steamer, 450 tons, was captured off the island of Eleuthera, April 16, 1863, by the U. S. S. *Vanderbilt*, Baldwin, commanding. In his report to Admiral Wilkes, Commander Baldwin said: "The *Gertrude* has on board an assorted cargo, including 250 barrels of powder, which stamps her as a contraband trader. * * * No log book can be found as yet." She was "caught after a hard chase of 28 miles, during which time a part of her cargo was thrown overboard. She was endeavoring to reach Harbor Island," and showed no colors till three shots had been fired, the last one at her, when she hoisted English colors. She "left Nassau on or about the 8th of April," and had since been off the southern coast, but having failed to run the blockade, and having only 36 hours' coal aboard, was on her way back to Nassau when fallen in with. A person was on board, a citizen of Charleston, who was taken to be a pilot. (Official Records of the Union and Confederate Navies, Ser. I, vol. 2, p. 159.) No claim was put in for the vessel and no appeal taken from the sentence of condemnation.

and no manifest. The vessel was originally built and owned in the United States, and there was strong evidence to show that she was enemy's property. The shipping articles specified a voyage from London to Cuba and Sierra Leone and any ports on the coast of Africa, of North or South America, or of the West Indies, and back to the United Kingdom. The letter of instructions from the owners of the cargo directed the master to proceed to Cardenas, Cuba, and on arrival there to report to "Charles J. Helm, esq.," who was to direct his "future actions with reference to the schooner and cargo." Charles J. Helm was the agent of the Confederate States in Cuba.

The first mate testified that "the destination of the cargo was certainly to one of the Confederate States, and the vessel was in like manner so destined, if Charles J. Helm, the Confederate agent at Cuba, should so direct." He narrated at length how he had met Mr. Yancey and other well-known agents of the Confederacy at the house of Isaac, Campbell & Co., and how he was at first employed to undertake a blockade-running adventure on the steamer *Gladiator*, and was afterwards transferred to the *Stephen Hart*, nominally as mate but really in charge of the cargo. Before the *Stephen Hart* sailed he was directed by one of the Confederate agents to proceed to Cardenas and there work under the instructions of Charles J. Helm, and he was informed that the cargo was to be transshipped into a steamer which could with greater facility run the blockade, unless, indeed, the *Stephen Hart* should be ordered to proceed herself.

Upon this and much other evidence of similar purport, Judge Betts declared that no doubt was left upon his mind that the case was "one of a manifest attempt to introduce contraband goods into the enemy's territory by a breach of blockade." There was an absence of all papers and circumstances to warrant the conclusion "that there was any intent to dispose of the cargo at Cardenas in the usual way of lawful commerce." The consignee of the entire cargo was the agent of the enemy, and it was laden on board by the enemy's agent in London.

The broad issue upon the merits of the cause was, said Judge Betts, "whether the adventure of the *Stephen Hart*

was the honest voyage of a neutral vessel from one neutral port to another neutral port, carrying neutral goods between those two ports only, or was a simulated voyage, the cargo being contraband of war, and being really destined for the use of the enemy, and to be introduced into the enemy's country by a breach of blockade by the *Stephen Hart*, or by transshipment from her to another vessel at Cardenas." This question, declared Judge Betts, was not to be decided by merely ascertaining whether the vessel was documented for, and sailing upon, a voyage from London to Cardenas. If the inquiry were thus limited "a very wide door would be opened for fraud and evasion." The commerce consisted in the destination and intended use of the property laden on board the vessel, and the proper test to be applied was whether the contraband goods "are intended for sale or consumption in the neutral market, or whether the direct and intended object of their transportation is to supply the enemy with them." If such was the object they were not exempt from forfeiture merely on the ground that they were neutral property, and that the port of delivery was also neutral. In this relation, Judge Betts said:

"If the guilty intention, that the contraband goods should reach a port of the enemy, existed when such goods left their English port, that guilty intention can not be obliterated by the innocent intention of stopping at a neutral port on the way. If there be, in stopping at such port, no intention of transshipping the cargo, and if it is to proceed to the enemy's country in the same vessel in which it came from England, of course there can be no purpose of lawful neutral commerce at the neutral port by the sale or use of the cargo in the market there; and the sole purpose of stopping at the neutral port must merely be to have upon the papers of the vessel an ostensible neutral terminus for the voyage. If, on the other hand, the object of stopping at the neutral port be to transship the cargo to another vessel to be transported to a port of the enemy, while the vessel in which it was brought from England does not proceed to the port of the enemy, there is equally an absence of all lawful neutral commerce at the neutral port; and the only commerce carried on in

the case is that of the transportation of the contraband cargo from the English port to the port of the enemy, as was intended when it left the English port. The court holds that, in all such cases, the transportation or voyage of the contraband goods is to be considered as a unit, from the port of lading to the port of delivery in the enemy's country; that if any part of such voyage or transportation be unlawful, it is unlawful throughout; and that the vessel and her cargo are subject to capture, as well before arriving at the first neutral port at which she touches after her departure from England, as on the voyage or transportation by sea from such neutral port to the port of the enemy."[1]

Judge Betts was careful to distinguish between such a voyage as that in which the *Stephen Hart* was engaged and a voyage having an actual neutral terminus. With regard to the latter and to the vessel before the court he said:

"If she was, in fact, a neutral vessel and if her cargo, although contraband of war, was being carried from an English port to Cardenas for the general purpose of trade and commerce at Cardenas, and for use or sale at Cardenas, without any actual destination of the cargo, prior to the time of capture, to the use and aid of the enemy, then most certainly both the vessel and her cargo were free from liability of capture."

The sentence of condemnation pronounced by Judge Betts in this case was affirmed by the Supreme Court. Chief Justice Chase, who delivered the opinion, observed that the principal features of the case resembled that of the *Bermuda* and her cargo, but were perhaps even more irreconcilable with neutral good faith. "It is enough to say," declared Chief Justice Chase, "that neutrals who

[1] In support of these propositions Judge Betts cited the cases of The *Dolphin* and The *Pearl*, supra; Halleck on International Law, chap. 21, sect. 11, p. 504; 1 Kent's Commentaries, eighth edition, p. 85, note *a*; 1 Duer on Insurance, 568; Jecker *v.* Montgomery, 18 Howard, 110, 115; 2 Wildman's International Law, 20; The *Jonge Pieter*, 4 C. Rob., 79; The *Richmond*, 5 C. Rob., 356; The *William*, 5 C. Rob., 385; The *Nancy*, 3 C. Rob., 122; The United States, Stewart's Adm. Rep., 116; The *Imina*, 3 C. Rob., 167; The *Trende Sostre*, 6 C. Rob, 390; The *Columbia*, 1 C. Rob., 154; The *Neptunus*, 2 C. Rob., 110.

place their vessels under belligerent control and engage them in belligerent trade or permit them to be sent with contraband cargoes under cover of false destination to neutral ports, while the real destination is to belligerent ports, impress upon them the character of the belligerent in whose service they are employed, and can not complain if they are seized and condemned as enemy property."[1]

Case of the Bermuda.—The question discussed in the foregoing cases was first dealt with by the Supreme Court in the case of the steamship *Bermuda*,[2] which came up on an appeal from a decree of the United States district court for the eastern district of Pennsylvania condemning the vessel and part of her cargo, which were captured by the U. S. S. *Mercedita*, April 26, 1862, near the British West India island of Abaco.

It was claimed by the captors that the vessel was enemy's property; that it was her intention with her cargo, which was largely composed of munitions of war, to break, either directly or by transshipment, the blockade of the southern coast of the United States, and that both ship and cargo were on these and other grounds liable to capture and condemnation.

The ostensible owner of the ship was one Haigh, a British subject; her original master was one Tessier, a South Carolinian. On the day after her registration, Haigh, as appeared by a document from the Liverpool customs, executed a power of attorney to two persons named Hencle and Trenholm, both of Charleston, South Carolina, to sell the ship at any place out of the Kingdom for any sum they might deem sufficient. Trenholm was a member of the firm of Frazer, Trenholm & Co., of Liverpool, a branch of the house of John Frazer & Co., of Charleston, and the fiscal agents of the Confederacy in Great Britain, in which capacity they were largely engaged in fitting out cruisers and blockade runners.

With the registry and power of attorney above mentioned the *Bermuda* sailed for Charleston, S. C. Subsequently she changed her course and ran the blockade of Savannah, returning to Liverpool in the autumn of the same year. Her master, Tessier, was then transferred to

[1] The *Hart*, 3 Wallace, 559. [2] 3 Wallace, 514; 1865.

the *Bahama*, which afterwards became known for carrying the armament of the Confederate cruiser *Alabama*. In his place, as master of the *Bermuda*, was installed one Westendorff, who was licensed by the British authorities, on the recommendation of Frazer, Trenholm & Co., as an experienced shipmaster, sailing out of Charleston, who had commanded one of their ships. The name of the firm of Frazer, Trenholm & Co., Liverpool, was indorsed on the back of Westendorff's license as his address.

The *Bermuda* was now prepared at West Hartlepool for another voyage, ostensibly to Bermuda. The cargo consisted of various things, including tea, coffee, drugs, surgical instruments, shoes, boots, leather, saddlery, lawns with figures of a youth bearing onward the Confederate flag, military decorations, epaulettes, stars for the shoulder straps of officers of rank, many military articles with designs appropriate for use in the Confederate States, cases of cutlery stamped with the names of merchants in Confederate cities, several cases of double-barrelled guns stamped as manufactured for a dealer in Charleston, a large amount of munitions of war, five finished Blakely cannon in cases, with carriages, six cannon without cases, a thousand shells, several hundred barrels of gunpowder, 72,000 cartridges, 2,500,000 percussion caps, 21 cases of swords, and in addition a large quantity of army blankets and other materials. Numerous letters of friendship and business were found on board the vessel, as well as books and newspapers addressed to different persons in the Confederate States, and also a few memoranda, apparently in the nature of requests from persons in Charleston to Capt. Westendorff to buy things for them in England and bring them through the blockade. There were also on board several persons denominated in various letters as "Government passengers," and in one letter as "printers and engravers," who had been sent from Scotland by an agent of the Confederate Government, and who were entered on the crew list of the *Bermuda* as common sailors. They had with them a large number of boxes containing Confederate postage stamps, copper plates, envelopes, printing ink, and many reams of white bank-note paper watermarked C. S. A. There were also on board certain well-known

gentlemen, residents of Charleston, who were also entered on the shipping list as common sailors, under disguised names. Of the ship's real company, the master, the first mate, the clerk, and three seamen, were citizens of South Carolina, and the second mate, carpenter, and cook belonged to other Confederate States.

There were 45 bills of lading, of which 41 were for goods shipped by Frazer, Trenholm & Co. The whole cargo was shipped under their direction, and according to the bills of lading was to be delivered at the island of Bermuda "unto order or assigns." No consignees were named. Several persons connected with the ship, who were examined *in preparatorio*, thought that she belonged to Frazer, Trenholm & Co. A letter of one of the mates, found on board, seemed to indicate the same thing, as also a letter of the former captain, Tessier, to Westendorff.

Much stress was laid by the captors upon the correspondence found on board. It appeared that on January 16, 1862, Frazer, Trenholm & Co., at Liverpool, wrote to John Frazer & Co., at Charleston, that they had dispatched the ship *Ella* with a cargo to N. T. Butterfield, their agent at Hamilton, Bermuda, and that she would be followed by the steamer *Bermuda* with goods. On January 23 they wrote again, inclosing bills of lading of the cargo of the *Ella* and copies of invoices. The goods, they said, were "all shipped by our friends here; but the disposition of them there is left entirely to you, and in any market in which you may please to direct them. The bills of lading are indorsed to your order, or that of your authorized agent. * * * Captain Carter [of the *Ella*] is instructed to proceed to Bermuda, and there await your instructions," which were to be sent under cover to Butterfield. By a later letter, of February 28, 1862, addressed to "Messrs. Jno. Frazer & Co. (or their authorized agent), Hamilton, Bermuda," Messrs. Frazer, Trenholm & Co., referring to the invoices and bills of lading of the *Bermuda*, said they were "very full in every particular, and we think will greatly facilitate the delivery *and also the transshipment*, should this be determined upon." On April 1, 1862, the Charleston house, having by a previous letter informed Butterfield that they have been advised that the *Ella* had

been dispatched and that she would be followed by the *Bermuda*, wrote another letter requesting him to direct Captain Westendorff to take certain articles from the *Ella* and proceed to Nassau, reporting himself on arrival there to H. Adderly & Co., and to request Captain Carter to "keep in his cargo and wait further orders from us." This letter was received by Butterfield on the 19th of April and was forwarded the same day to Westendorff, at St. George's. Westendorff immediately acted upon it and sailed on the 23d of April toward Nassau. He had arrived at Bermuda on the 19th of March and had remained there about five weeks, during which the cargo was not touched. The gentlemen from Charleston were aboard.

Among the papers taken on board there was also an unfinished letter without signature, but apparently written by the engineer of the *Bermuda* to a friend. This letter was dated at Liverpool, February 16, 1862, and stated that "our tender," a light-draft boat called the *Herald*, had left the day before with a crew shipped for twelve months "for some port or ports south of Mason and Dixon's line;" that "three captains" were on the tender—"one an Englishman, nominal; another, an experienced coast pilot from the Potomac to Charleston; another, ditto, ditto, from Charleston to the San Juan River in Texas. If the Yankees reach her, they are smarter than I give them credit for. She awaits our arrival in Bermuda; goes first into Charleston. * * * ."

The record disclosed that the captain of the *Herald*, after his arrival at Bermuda, drew a bill on Frazer, Trenholm & Co., at Liverpool, in favor of Westendorff, showing that the latter had advanced a certain amount of money to the *Herald*. It was also testified by a person on the *Bermuda* that the *Herald* was connected with the former ship.

At the time of the capture, and after the vessel was boarded, the captain's brother, by his order, threw overboard two small boxes and a package, which he swore he understood contained postage stamps, and a bag which he understood contained letters, and which he was instructed to destroy in case of capture. One of the gentlemen from Charleston also destroyed a number of letters, which he swore were private letters, intrusted to him by Americans in Europe.

On the part of the claimants it was contended—

1. That the vessel was captured within British territorial waters.

2. That both the vessel and the cargo were owned by neutrals, and that their destination was either Bermuda or Nassau, a neutral port.

3. That there was no intent to run the blockade; that the ship, after arriving at Bermuda, was instructed to proceed to Nassau in order that her cargo might be landed and another cargo be taken on board for some port in Europe; that it was the intention of the consignees at Nassau, who were correspondents of Frazer, Trenholm & Co., to carry out these instructions strictly; that a part of the munitions of war were intended for the Government of Hayti, and the rest, "for sale at Bermuda or Nassau, in the usual course of business, to any person willing to purchase the same."

4. That the fact that the ship was not intended to run the blockade was shown by the circumstance that the "government passengers," though they all undoubtedly wished to enter the Confederate States, all disembarked at Bermuda and did not rejoin the vessel when she sailed to Nassau.

5. That there was no concealment as to anything on board; that everything was fairly entered on the bills of lading and manifest; and that the crew were shipped for a term not exceeding twelve months from Liverpool to Bermuda, and thence, if required, to any ports or places in the West Indies, British North America, the United States, and back to the United Kingdom; and that their wages did not exceed that of ordinary voyages in peaceful times.

The opinion of the court was delivered by Chief Justice Chase, and was unanimous.

The court held that all the circumstances, including that of the spoliation of papers, which was one of unusual aggravation, warranted the most unfavorable inference as to ownership, employment, and destination; that all the transactions repelled the conclusion that Haigh was the true owner; that not a document taken on the ship showed ownership in him except the shipping articles, which were

false in putting upon the crew list employees of the Confederate Government and enemy passengers: that there was no indication that, after Haigh gave the power of attorney, he performed a single act of ownership; that no letter alluded to him as owner, and no direction as to vessel or cargo recognized him as such; but that, on the contrary, all the papers and all the circumstances indicated that a sale was made in Charleston under the power, by which the beneficial control and real ownership were transferred to John Frazer & Co., while the apparent title, by the British papers, was suffered to remain in Haigh as a cover. It was therefore held that the ownership of Haigh was a pretense, and that the vessel was rightly condemned as enemy property.

Assuming for the moment, however, that Haigh was the owner of the ship, the court next considered the question as to the employment of the vessel and cargo at the time of the capture. The theory of counsel for Haigh was, said the court, that the ship was neutral and carried a neutral cargo, in good faith, from one neutral port to another; and they insisted that the description[1] of cargo, if neutral, and in a neutral ship, and on a neutral voyage, could not be inquired into in the courts of a belligerent. "We agree to this," said the court. Neutrals might "convey in neutral ships, from one neutral port to another, any goods, whether contraband of war or not, if intended for actual delivery at the port of destination, and to become part of the common stock of the country or of the port."

It was asserted by counsel, said the court, that British merchants had "a perfect right to trade, even in military stores, between their own ports, and to sell at one of them goods of all sorts, even to an enemy of the United States, with knowledge of his intent to employ them in rebel war against the American Government. If," continued the court, "by trade between neutral ports is meant real trade, in the course of which goods conveyed from one port to another become incorporated into the mass of goods for sale in the port of destination; and if by sale to the ene-

[1] Possibly the phrase "description of cargo," which appears in the published report, is a misprint. The character of the cargo is what seems to be meant.

mies of the United States is meant sale to either belligerent, without partiality to either, we accept the proposition of counsel as correct. But if it is intended to affirm that a neutral ship may take on a contraband cargo ostensibly for a neutral port, but destined in reality for a belligerent port, either by the same ship or by another, without becoming liable, from the commencement to the end of the voyage, to seizure, in order to the confiscation of the cargo, we do not agree to it."

Applying these principles to the case under consideration, the court observed that a large part of the cargo was contraband in the narrowest sense of the word, and a part of it expressly destined to the Confederate States, so that the character of the cargo made "its ulterior, if not direct, destination to a rebel port quite certain." There was, besides, evidence of destination found in the letters of Frazer, Trenholm & Co. which made distinct references to the contingency of transshipment; and the evidence showed that the *Herald* was sent over with a view to this. Moreover, the consignment of the whole cargo to order or assigns, which meant in fact to the order of John Frazer & Co., of Charleston, was "conclusive, in the absence of proof to the contrary, that its destination was the port in which the consignee resided and transacted business. * * * It makes no difference," said the court, "whether the destination to the rebel port was ulterior or direct; nor could the question of destination be affected by transshipment at Nassau, if transshipment was intended, for that could not break the continuity of transportation of the cargo. The interposition of a neutral port between neutral departure and belligerent destination has always been a favorite resort of contraband carriers and blockade runners. But it never avails them when the ultimate destination is ascertained. A transportation from one point to another remains continuous, so long as intent remains unchanged, no matter what stoppages or transshipments intervene."[1] There seemed to be no reason, said the court, "why this reasonable and settled doctrine should not be applied to each ship

[1] The court cited Jecker *v.* Montgomery, 18 Howard, 114; The *Polly*, 2 C. Rob., 369; The *William*, 5 C. Rob., 395; 1 Kent's Commentaries, 84, note.

where several are engaged successively in one transaction, namely, the conveyance of a contraband cargo to a belligerent. The question of liability must depend on the good or bad faith of the owners of the ships. If a part of the voyage is lawful, and the owners of the ship conveying the cargo in that part are ignorant of the ulterior destination, and do not hire their ship with a view to it, the ship can not be liable; but if the ulterior destination is the known inducement to the partial voyage, and the ship is engaged in the latter with a view to the former, then whatever liability may attach to the final voyage must attach to the earlier, undertaken with the same cargo and in continuity of its conveyance. Successive voyages, connected by a common plan and a common object, form a plural unit. They are links of the same chain, each identical in description with every other, and each essential to the continuous whole."

Should the *Bermuda*, on these principles, be condemned for the conveyance of contraband? By the ancient rule, said the court, the vessel which carried contraband was condemned as well as the cargo. Of this rule there had been a great but very proper relaxation to the effect that the neutral might convey contraband to a belligerent, subject to no liability except seizure with a view to the confiscation of the offending goods. This relaxation, however, required good faith on the part of the neutral, and did not protect the ship where good faith was wanting. Thus, the carrying of contraband with a false destination was a ground of condemnation.[1] Mere consent to transportation of contraband will not always or usually be taken to be a violation of good faith; but the belligerent is entitled to require of neutrals a frank and *bona fide* conduct.[2] So, too, vessels had been condemned for being engaged actually or practically in enemy service.[3]

What, then, inquired the court, were the marks by which the conveyance of contraband on the *Bermuda* was

[1] The *Franklin*, 3 C. Rob., 224.

[2] The *Neutralitet*, 3 C. Rob., 296; Carrington *v.* Merchants' Insurance Co., 8 Peters, 518; The *Ranger*, 6 C. Rob., 126.

[3] The *Jonge Emilia*, 3 C. Rob., 52; The *Carolina*, 4 C. Rob., 256.

accompanied? First, there was the character of the contraband articles fitted for immediate military use in battle or for the immediate civil service of the enemy government; then, the deceptive bills of lading requiring delivery at Bermuda, when there was either no intention to deliver there at all or none not subject to be changed by the enemies of the United States; then, the appointment of one of these enemies as master, necessarily made with the knowledge and consent of Haigh, if he was the owner; then the complete surrender of the vessel to the use and control of such enemies, without even the pretence of want of knowledge by the alleged owner, of her destined and actual employment. The circumstances rendered it highly probable that the ship at the time of capture was actually in the service of the Confederate Government, and known to be so by all parties interested in her ownership. But, however this might be, it could not be doubted that the *Bermuda* was justly liable to condemnation "for the conveyance of contraband goods destined to a belligerent port, under circumstances of fraud and bad faith, which make the owner, if Haigh was owner, responsible for unneutral participation in the war. The cargo, having all been consigned to enemies, and most of it contraband, must share the fate of the ship."

Having thus disposed of the questions connected with the ownership, control, and employment of the *Bermuda* and the character of her cargo, the court added that little need be said on the subject of liability for the violation of the blockade. "What has been already adduced of the evidence," said the court, "satisfies us completely that the original destination of the *Bermuda* was to a blockaded port, or, if otherwise, to an intermediate port, with intent to send forward the cargo by transshipment into a vessel provided for the completion of the voyage. It may be that the instructions to Westendorff were not settled when the steamship left St. George's for Nassau; but it is quite clear to us that the ship was then at the disposition of John Frazer & Co., and that the voyage, begun at Liverpool with intent to violate the blockade, delayed at St. George's for instructions from that firm, continued toward

Nassau for the purpose of completion from that port to a rebel port, either by the *Bermuda* herself or by transshipment, was one voyage from Liverpool to a blockaded port, and that the liability to condemnation for attempted breach of blockade was, by sailing with such purpose, fastened on the ship as firmly as it would have been by proof of intent that the cargo should be transported by the *Bermuda* herself to a blockaded port, or as near as possible, without encountering the blockading squadron, and then sent in by a steamer, like the *Herald*, of lighter draft or greater speed."

As to the question of capture within neutral waters, the court observed that there was nothing in the evidence which proved to its satisfaction that such was the fact.

It was therefore held that "both vessels and cargo, even if both were neutral, were rightly condemned."

By this judgment the decree of the court below condemning the vessel and the munitions of war was affirmed. Subsequently the district court passed a decree condemning the residue of the cargo.

Case of the Springbok.—Of all the decisions rendered by the Supreme Court in cases involving the question of continuous voyage, that which was pronounced in the case of the British bark *Springbok* has been most discussed and most criticised.[1] The case came up on appeal from a decree of the United States district court for the southern district of New York, condemning the bark and her cargo,[2] which had been captured at sea by the United States gunboat *Sonoma*.[3]

It appeared the vessel was owned by British subjects and was commanded by the son of one of the owners. She

[1] The Springbok (1866), 5 Wallace, 1.

[2] Blatchford's Prize Cases, 349; May, 1863.

[3] Commander T. H. Stevens, U. S. S. *Sonoma*, in a report to Admiral Wilkes, Feb. 9, 1863, said: "On the morning of the 3d of February, while looking for the *Oreto*, I captured the English bark *Springbok*, loaded with contraband, bound to Nassau, but having nothing in the way of a manifest of a legal character, and being upon the list furnished by you. I sent her to New York for adjudication in charge of Acting Master Foster Willis, with a prize crew from this vessel. The vessel was from London. The capture was made in latitude 25° 41′ N., long. 74° 46′ W." (Official Records of the Union and Confederate Navies, Ser. I, vol. 2, p. 70.)

was chartered November 12, 1862, to T. S. Begbie, of London, to take a cargo of merchandise and therewith "proceed to Nassau, or so near thereunto as she may safely get, and deliver same," and thirty days were allowed "for loading at port of loading and discharging at Nassau." This document was indorsed by Speyer & Haywood, who, on December 8, 1862, instructed the master: "You will proceed at once to the port of Nassau, N. P., and on arrival report yourself to Mr. B. W. Hart there, who will give you orders as to the delivery of your cargo." In a letter directed to Hart, Speyer & Haywood spoke of themselves as acting "under instructions from Messrs. Isaac, Campbell & Co." By the bills of lading the cargo was to be delivered to order or assigns.

The ship set sail from London December 8, 1862, and was captured February 3, 1863, about 150 miles east of Nassau, when making for that port. When captured, she made no resistance and her papers were given up without any attempt at concealment or spoliation.

On the hearing before the district court, counsel for the captors invoked the proofs taken in two other cases then on trial, namely, United States *v.* The Steamer Gertrude,[1] and United States *v.* The Schooner Stephen Hart.[2] As has been seen, the *Stephen Hart* was captured January 29, 1862, and the claimants of her cargo were Isaac, Campbell & Co., who claimed jointly with Begbie the cargo of the *Springbok*. The brokers who had charge of the lading of the *Stephen Hart* were also Speyer & Haywood. The *Gertrude* was captured April 16, 1863, off one of the Bahama islands while on a voyage ostensibly from Nassau to St. John's, N. B. She was condemned, and no claim was put in either to the vessel or her cargo. The testimony showed that she belonged to Begbie; that her cargo consisted, among other things, of hops, dry goods, drugs, leather, cotton cards, paper, 3,960 pair of gray army blankets, 335 pair of white blankets, linen, woolen shirts, flannel, 750 pair of army brogans, Congress gaiters, and 24,900 pounds of powder; that she was captured after a

[1] Blatchford's Prize Cases, 374; July, 1863.
[2] Id. 387; July, 1863, supra.

chase of three hours, and when making for the harbor of Charleston, her master knowing of its blockade, and having on board a Charleston pilot under an assumed name.

The opinion of the Supreme Court in the case of the *Springbok* was delivered by Chief Justice Chase. He admitted that the invocation of the documents in the cases of the *Gertrude* and the *Stephen Hart*, at the original hearing, was not "strictly regular;" but he also held that the irregularity was not such as would justify a reversal of the decree of the court below, or a refusal to examine the documents invoked and forming part of the record.

It had already been held, said the court, in the case of the *Bermuda* that where goods destined ultimately for a belligerent port were "being conveyed between two neutral ports by a neutral ship, under a charter made in good faith for that voyage, and without any fraudulent connection on the part of her owners with the ulterior destination of the goods," the ship, though liable to seizure in order that the goods might be confiscated, was not liable to condemnation as prize. The *Springbok* was thought fairly to come within this rule. Her papers were regular and genuine and showed a neutral destination of the ship. Her owners were neutral and did not appear to have any interest in the cargo, nor was there any proof that they knew of its alleged unlawful destination. It was therefore adjudged that the ship should be restored; but in view of a misrepresentation made by the master when examined and of the circumstance that he signed bills of lading which did not truly and fully state the nature of the goods contained in certain bales and cases, no costs or damages were allowed to the claimant.

The case of the cargo was, said the court, quite different. In addition to the facts heretofore noted as to the lading and consignment of the cargo, the court stated that the bills of lading, while they disclosed the contents of 619 packages, "concealed" the contents of 1,388. On this point the court laid great stress, especially in view of the fact that the owners of the cargo knew that it was going "to a port in the trade with which the utmost candor of statement might be reasonably required." The true reason of the concealment must be found in the desire of the owners to hide from the scrutiny of the Amer-

ican cruisers the contraband character of a considerable part of the contents of the packages. Moreover, the bills of lading and the manifest "concealed" the names of the owners. The true motive of this concealment must have been, said the court, the apprehension of the claimants that the disclosure of their names as owners would lead to the seizure of the ship in order that the cargo might be condemned. It was admitted, however, that "these concealments" did not of themselves warrant condemnation, and the court then proceeded "to ascertain the real destination of the cargo." "If," said the court, "the real intention of the owners was that the cargo should be landed at Nassau and incorporated by real sale into the common stock of the island, it must be restored, notwithstanding this misconduct. What, then, was this real intention?"

That some other destination than Nassau was intended was inferred, first, from the fact that by the bills of lading and the manifest the cargo was consigned to order or assigns. This was treated as a "negation" that a sale was intended to anyone at Nassau, since, if such a sale had been intended, the goods would most likely have been consigned for that purpose to some established house named in the bills of lading. This inference was strengthened by the fact that the agent of the owners at Nassau was to receive the property and execute the instructions of his principals.

These instructions were not in evidence; but they might, said the court, be collected in part from the character of the cargo. A part of it, small in comparison with the whole, consisted of arms and munitions of war. A somewhat larger part consisted of articles useful and necessary in war. These portions being contraband, the residue belonging to the same owners must share their fate. "But," declared the court, "we do not now refer to the character of the cargo for the purpose of determining whether it was liable to condemnation as contraband, but for the purpose of ascertaining its real destination; for, we repeat, contraband or not, it could not be condemned, if really destined for Nassau and not beyond; and, contraband or not, it must be condemned if destined to any rebel port, for all rebel ports were under blockade.

"Looking at the cargo with this view we find that a part of it was specially fitted for use in the rebel military service and a larger part, though not so specially fitted, was yet well adapted to such use. Under the first head we include the sixteen dozen swords, and the ten dozen rifle bayonets, and the forty-five thousand navy buttons, and the one hundred and fifty thousand army buttons; and under the latter the seven bales of army cloth and the twenty bales of army blankets and other similar goods. We can not look at such a cargo as this and doubt that a considerable portion of it was going to the rebel States, where alone it could be used; nor can we doubt that the whole cargo had one destination.

"Now if this cargo was not to be carried to its ultimate destination by the *Springbok* (and the proof does not warrant us in saying that it was), the plan must have been to send it forward by transshipment. And we think it evident that such was the purpose. We have already referred to the bills of lading, the manifest, and the letter of Speyer & Haywood as indicating this intention, and the same inference must be drawn from the disclosures by the invocation that Isaac, Campbell & Co. had before supplied military goods to the rebel authorities by indirect shipments and that Begbie was the owner of the *Gertrude* and engaged in the business of running the blockade.

"If these circumstances were insufficient grounds for a satisfactory conclusion, another might be found in the presence of the *Gertrude* in the harbor of Nassau with undenied intent to run the blockade about the time when the arrival of the *Springbok* was expected there. It seems to us extremely probable that she had been sent to Nassau to await the arrival of the *Springbok* and to convey her cargo to a belligerent and blockaded port, and that she did not so convey it only because the voyage was intercepted by the capture.

"All these condemnatory circumstances must be taken in connection with the fraudulent concealment attempted in the bills of lading and the manifest and with the very remarkable fact that not only has no application been made by the claimants for leave to take further proof in order to furnish some explanation of these circumstances, but

that no claim, sworn to personally, by either of the claimants, has ever been filed.

"Upon the whole case we can not doubt that the cargo was originally shipped with intent to violate the blockade; that the owners of the cargo intended that it should be transshipped at Nassau into some vessel more likely to succeed in reaching safely a blockaded port than the *Springbok;* that the voyage from London to the blockaded port was, as to cargo, both in law and in the intent of the parties, one voyage; and that the liability to condemnation, if captured during any part of that voyage, attached to the cargo from the time of sailing."

In conformity with this opinion the decree of condemnation of the district court was reversed as to the ship, but without costs or damages to the claimants, and was affirmed as to the cargo.

Matamoras cases—the Peterhoff.—The Mexican town of Matamoras, situated on the Rio Grande, nearly opposite Brownsville, in Texas, which formed one of the Confederate States, offered obvious advantages as a base of contraband trade.

The steamer *Peterhoff* was captured Feb. 25, 1863, near the island of St. Thomas, D. W. I., by the U. S. S. *Vanderbilt*, and was condemned by the United States district court for the southern district of New York, together with her cargo, for attempt to break the blockade. From this sentence an appeal was taken to the Supreme Court.[1]

The *Peterhoff* was fully documented as a British merchant steamer upon a voyage, as shown by her manifest, shipping list, clearances, and other papers, from London, England, to Matamoras, in Mexico. The bills of lading all stipulated for the delivery of the goods "off the Rio Grande, Gulf of Mexico, for Matamoras," adding that they were to be taken from alongside the ship, provided that lighters could cross the bar at the mouth of the river. The cargo was miscellaneous, and shipped by different persons, all but one of whom were British subjects, and a part of it belonged to the owner of the vessel. Of the numerous packages a certain number contained articles

[1] The Peterhoff (1866), 5 Wallace, 28.

useful for military purposes during war. Among them were 36 cases of artillery harness, 14,450 pair of "Blucher" boots, 5,580 pair of "government regulation grey blankets," 95 casks of horseshoes of large size, suitable for cavalry service, and 52,000 horseshoe nails. There were also considerable amounts of iron, steel, shovels, spades, blacksmiths' bellows and anvils, nails, and leather, and an assorted lot of drugs—1,000 pounds of calomel, large quantities of morphine, 265 pounds of chloroform, and 2,640 ounces of quinine. Owing to the blockade of the coast, drugs, and especially quinine, were greatly needed in the Southern States.

With the exception of a portion consigned to the order of the master, which belonged to the owners of the vessel, the cargo was represented in agency or consigneeship chiefly by three different persons on board the vessel as passengers—Redgate, Bowden, and Almond—all natives of Great Britain, and at the time of the capture all British subjects, except Redgate, who had become a citizen of the United States, and who, before the outbreak of the war, resided in Texas. He stated that at the time of the capture he intended to establish a mercantile house at Matamoras, and that, had his "goods arrived there, they were to take the chances of the market." Bowden and Almond testified to substantially the same effect as to their respective ventures. During the war Matamoras, which lies on the Mexican side of the Rio Grande, nearly opposite the town of Brownsville, in Texas, had, by reason of the facilities which as a neutral port it offered for trade with the Confederacy, whose seaports were all blockaded, suddenly risen from the position of a place of no importance "into a great centre of commercial activity, rivalling the trade of New York or Liverpool."

The opinion of the Supreme Court in the case of the *Peterhoff* was delivered by Chief Justice Chase. He stated that the record satisfied the court that the voyage of the ship "was not simulated." She was "in the proper course of a voyage from London to Matamoras;" nor was there any evidence which fairly warranted the belief "that the cargo had any other direct destination." The proposed delivery of the cargo off the mouth of the Rio

Grande into lighters for Matamoras was "in the usual course of trade," since it was impossible for a vessel of heavy draught to enter the river. "It is true," said the court, "that by these lighters some of the cargo might be conveyed directly to the blockaded coast; but there is no evidence which warrants us in saying that such conveyance was intended by the master or the shippers. We dismiss, therefore, from consideration, the claim, suggested rather than urged in behalf of the Government, that the ship and cargo, both or either, were destined for the blockaded coast."

But it was maintained in argument by counsel for the captors (1) that trade with Matamoras was, at the time of the capture, made unlawful by the blockade of the mouth of the Rio Grande; and, if this was not the case, (2) that the ulterior destination of the cargo was Texas and the other States in rebellion, and that this ulterior destination constituted a breach of the blockade.

On these points the court held—

1. That "the mouth of the Rio Grande was not included in the blockade of the ports of the rebel States, and that neutral commerce with Matamoras, except in contraband, was entirely free."

2. That "neutral trade to or from a blockaded country by inland navigation or transportation," is lawful; and, "therefore, that trade, between London and Matamoras, even with intent to supply from Matamoras goods to Texas, violated no blockade, and can not be declared unlawful." "Such trade," said the court, "with unrestricted inland commerce between such a port and the enemy's territory, impairs undoubtedly and very seriously impairs the value of a blockade of the enemy's coast. But in cases such as that now in judgment, we administer the public law of nations, and are not at liberty to inquire what is for the particular advantage or disadvantage of our own or another country."

The question of breach of blockade being thus excluded, the court proceeded to consider the question of the destination of the cargo in connection with the question of contraband. Taking up the usual classification of articles with reference to this question—(1) those used primarily

for purposes of war, (2) those used for purposes of war or of peace according to circumstances, and (3) those used exclusively for peaceful purposes—the court observed that a considerable part of the cargo was of the third class and need not be further considered. A large part, perhaps, was of the second class, but as it was "not proved * * * to have been actually destined to belligerent use," it therefore could not, said the court, "be treated as contraband." "Another portion was, in our judgment," continued the court, "destined directly to the rebel military service. This portion of the cargo consisted of the cases of artillery harness and of articles described in the invoices as 'men's army bluchers,' 'artillery boots,' and 'government regulation gray blankets.' These goods come fairly under the description of goods primarily and ordinarily used for military purposes in time of war. They make part of the necessary equipment of an army."

With regard to these articles, which were adjudged to be condemned as contraband, the language of the court is to be specially noted. "It is true that even these goods," said the court, "if really intended for sale in the market of Matamoras, would be free of liability: for contraband may be transported by neutrals to a neutral port, if intended to make part of its general stock in trade. But there is nothing in the case which tends to convince us that such was their real destination, while all the circumstances indicate that these articles, at least, were destined for the use of the rebel forces then occupying Brownsville, and other places in the vicinity.

"And contraband merchandise is subject to a different rule in respect to ulterior destination than that which applies to merchandise not contraband. The latter is liable to capture only when a violation of blockade is intended; the former when destined to the hostile country, or to the actual military or naval use of the enemy, whether blockaded or not. * * * Hence, while articles, not contraband, might be sent to Matamoras and beyond to the rebel region, where the communications were not interrupted by blockade, articles of a contraband character, destined in fact to a State in rebellion, or for the use of the rebel military forces, were liable to capture though

primarily destined to Matamoras. We are obliged to conclude that the portion of the cargo which we have characterized as contraband must be condemned."

Restitution of the ship was decreed on payment of costs and expenses. This condition was imposed, notwithstanding the finding that her destination was neutral, (1) because the master, when brought to by the *Vanderbilt*, refused to send his papers on board; (2) because papers were destroyed on board the ship at the time of the capture; and (3) because it was the duty of the captors, since contraband was found on board "destined to the enemy," to bring the ship in for adjudication.

Case of the Science.—In two other Matamoras cases, decided at the same term, the Supreme Court decreed restitution, in the absence of proof of actual enemy destination. The first of these was that of the *Science.*[1] Chief Justice Chase, delivering the opinion of the court, stated that the evidence was "clear that the vessel and her outward cargo were neutral property, destined to neutral consignees at Matamoras, and that the cargo had actually been delivered as consigned." "Some of the proof," the court added, "tended to show that a portion of this cargo consisted of Confederate uniform cloth; but there was none showing destination to enemy territory or immediate enemy use. There was, therefore, nothing in the character of the vessel or of the outward cargo which warrants condemnation."

Case of the Volant.—At the same time the court decided the case of the *Volant*,[2] another Matamoras case. The Chief Justice, delivering the opinion, stated that the proof showed that the vessel was the property of a neutral merchant of the island of Jersey, documented as a British merchantman, and regularly cleared from London to Matamoras. The cargo was shipped by the charterers of the vessel for neutral owners, and consigned to neutrals at Matamoras, but had not been discharged at the time of capture. "It consisted," said the court, "in part of bales of Confederate uniform cloth, of the same mark and of corresponding numbers with like goods found on the

[1] 5 Wallace, 178. [2] 5 Wallace, 179.

Science; but there is no proof of unlawful destination." The decree of the court below, condemning the ship and cargo, was accordingly reversed.

Hall, referring to the cases in which the English prize courts have applied the doctrine of continuous voyages, states that those courts "were careful not to condemn until what they conceived to be the hostile act was irrevocably entered upon" by departure "from the port of colorable importation to the enemy country;" and he declares that "the American decisions have been universally reprobated outside the United States, and would probably now find no defenders in their own country."[1] He does not cite, however, any case in which it was held by an English court that the performance of the process of "colorable importation" was a prerequisite to condemnation, nor does he exhibit his usual accuracy in his censure of the American decisions, which found, as will be shown, a defender in his own Government.

In the cases of the *Susan* and the *Hope*,[2] neutral American vessels were condemned by Sir William Scott for carrying, on voyages from Bordeaux to the neutral port of New York, official dispatches destined to French authorities in the West Indies. In neither case does it appear to have been alleged that the apparent destination of the vessel was not her true and final destination, or that she was specially employed by the French Government. Nevertheless, it was held that the transportation of the dispatches toward their belligerent destination was an unneutral and prohibited service.

Returning to the American decisions, it appears that on February 20, 1864, Earl Russell instructed Lord Lyons, then British minister at Washington, that Her Majesty's Government had considered the judgment of Judge Betts in the case of the *Springbok*, in communication with the law officers of the Crown, and saw no reason to change the opinion that they "could not officially interfere in the matter, but that the owners must be left to the usual and proper remedy of an appeal. On the contrary," declared Earl Russell, "a careful perusal of this

[1] Int. Law, 4th ed., 695, note.

[2] The Caroline, 6 C. Rob., 641, note.

elaborate and able judgment, containing the reasons of the judge, the authorities cited by him in support of it, and the important evidence properly invoked from the cases of the *Stephen Hart* and the *Gertrude* (which Her Majesty's Government have now seen for the first time) in which the same parties were concerned, goes so far to establish that the cargo of the *Springbok*, containing a considerable portion of contraband, was never really and *bona fide* destined for Nassau, but was either destined merely to call there or to be immediately transshipped after its arrival there without breaking bulk and without any previous incorporation into the common stock of that colony, and then to proceed to its real destination, being a blockaded port. The complicity of the owners of the ship, with the design of the owners of the cargo, is, to say the least, so probable on the evidence that there would be great difficulty in contending that this ship and cargo had not been rightly condemned."

February 5, 1868, the attorney of the owners of the cargo transmitted to Lord Stanley, then foreign secretary, the sentence of the Supreme Court, by which the condemnation of the cargo was affirmed and a decree of restitution entered as to the vessel. He also enclosed a copy of the joint opinion of Messrs. George Mellish, Q. C., and W. Vernon Harcourt, Q. C., holding the sentence to be erroneous and unjust, and stated that in that opinion he had no doubt the law officers of the Crown would concur. He asked that compensation be demanded for the owners of the cargo from the United States for the condemnation of their property.

This petition was referred to the law officers of the Crown, and on July 24, 1868, the foreign office, after an extended review of the papers in the case, including the opinion of counsel, announced the conclusion that Her Majesty's Government would not be "justified, on the materials before them, in making any claim" for compensation. With reference to the opinion of counsel, the foreign office observed that it found fault with the judgment because one ground taken by the court as justifying the conclusion that Nassau was not the real destination of the cargo, was derived from the forms of the bills of

lading, which, although they did not disclose the contents of the packages or name any consignee, the cargo being deliverable to "order or assigns," were, it was maintained, on the testimony of some of the principal brokers of London, "in the usual and regular form of consignment to an agent for sale at such a port as Nassau." No doubt, said the foreign office, the form was usual in time of peace; but a practice which might be "perfectly regular in time of peace under the municipal regulations of a particular state, will not always satisfy the laws of nations in time of war, more particularly when the voyage may expose the ship to the visit of belligerent cruisers." Thus it was laid down by Dr. Lushington, in the case of the *Abo*,[1] that where cargo is shipped *flagrante bello*, the bills of lading on their face ought to express for whose account and risk the property was shipped. The ship's manifest in the present case was, said the foreign office, equally silent on the subject; and, "having regard to the very doubtful character of all trade ostensibly carried on at Nassau during the late war in the United States, and to many other circumstances of suspicion before the court, Her Majesty's Government are not disposed to consider the argument of the court on this point as otherwise than tenable."

As to the argument of counsel that the character of the cargo, being fitted for blockade running, was a proof that it was destined for Nassau, which was the great entrepôt for contraband of war, the foreign office declared that it was one "to which much weight can not be attached." Under "all the circumstances of time and place," and in the absence of evidence from the claimants as to what was to become of the goods on their arrival at Nassau, Her Majesty's Government thought "the court was entitled to draw the inference that the consignors of the goods intended to be parties to the immediate transshipment and importation of these goods into a blockaded port, on their being taken out of the *Springbok*."

In connection with the contention of counsel that the court erred in its statement that the *Gertrude* was at Nassau with undenied intent to run the blockade about the

[1] Spinks, 350.

time when the *Springbok* was expected to arrive there, the foreign office observed that the decision of the court did not appear to be based on that ground, but found "that the owners of the cargo intended that it should be transshipped at Nassau in some vessel more likely to succeed in reaching a blockaded port than the *Springbok*." As a fact, said the foreign office, the voyage of the *Gertrude* appeared to have been delayed, but "when she did reach Nassau, after the capture of the *Springbok*, she took on board a contraband cargo, upon which the marks and numbers corresponded to some extent with certain marks and numbers on many packages in the *Springbok*, and she was captured and condemned without any attempt being made to resist such condemnation."[1]

In the case of the *Peterhoff*, it appears that the British consul at New York on August 3, 1863, transmitted to his Government a copy of Judge Betts's decree condemning the vessel and her cargo, and stated that the judge would later deliver *in extenso* his reasons for the condemnation. With reference to the decree, Earl Russell instructed Lord Lyons, Oct. 31, 1863, that Her Majesty's Government, having considered the judicial proceedings, in communication with the law officers of the Crown, adhered to the opinion that any official intervention in the present stage of the case was inexpedient. "The evidence," said Earl Russell, "is certainly not 'clearly and unequivocally inadequate to sustain the sentence,' but, on the contrary, in various particulars tends to sustain it; such as the false swearing of the master or, at least, the palpable equivocation and disingenuousness of his evidence; the throwing overboard of papers, the contents of which are said to be unknown at the moment of capture; the incredible and conflicting suggestions (in the absence of a true explanation which the claimants might have obtained) as to their contents, and the character of certain portions of the cargo."

April 22, 1864, the full opinion of Judge Betts in the case of the *Peterhoff* having been received, as well as that of Judge Marvin in the cases of the *Dolphin* and the *Pearl*, Earl Russell instructed Lord Lyons, after consulting the

[1] Blue Book, Miscellaneous, No. 1 (1900).

law officers of the Crown, that Her Majesty's Government did not consider that the decisions in the cases of the *Peterhoff* and the *Dolphin* called "for any intervention on their part. Her Majesty's Government," continued Earl Russell, "without adopting all the reasons assigned in these judgments (in some of them, indeed, they do not concur), are not prepared to say that the decisions themselves, under all the circumstances of the cases, are not in harmony with the principles of the judgments of the English prize courts. With respect to the case of the *Pearl*, Her Majesty's Government consider that the course adopted by the judge is fair and equitable."[1]

In the cases of the *Springbok*, *Peterhoff*, *Dolphin*, and *Pearl*, claims for compensation were made before the international commission under Art. XIII of the Treaty of Washington of May 8, 1871. None was presented in the case of the *Bermuda*.

In the case of the *Springbok* the commission unanimously disallowed all claims on account of the cargo. An award of $5,065 was made as damages for the detention of the vessel from the date of the decree of the district court till her discharge under the decree of the Supreme Court.[2]

The *Peterhoff* claims were all unanimously disallowed.[3]

The cases of the *Dolphin* and the *Pearl* were similarly disposed of.[4]

The commission consisted of the Hon. J. S. Frazer, sometime a justice of the supreme court of the State of Indiana; the Rt. Hon. Russell Gurney, a member of Her Majesty's privy council and recorder of London, and Count Corti, Italian minister at Washington.[5]

When we consider on the one hand the not infrequent censure of the American decisions as introducing novel and unwarranted doctrines, and on the other hand the contrary opinion expressed by the British Government and implied by the action of the international commision,

[1] Blue Book, Miscellaneous, No. 1 (1890).

[2] Int. Arbitrations, III, 3928–3935.

[3] Int. Arbitrations, III, 3833–3843.

[4] Hale's Report, 92, 115.

[5] Int. Arbitrations, I, 690

it seems not inappropriate to recall the words of Lord Stowell:[1]

"All law is resolvable into general principles: The cases which may arise under new combinations of circumstances, leading to an extended application of principles, ancient and recognized, by just corollaries, may be infinite; but so long as the continuity of the original and established principles is preserved pure and unbroken, the practice is not *new*, nor is it justly chargeable with being *an innovation* on the ancient law, when, in fact, the court does nothing more than apply old principles to new circumstances."

III. *Delagoa Bay: German cases.*—An interesting and important discussion of questions of contraband and continuous voyage may be found in the correspondence between Germany and Great Britain growing out of the seizure and detention by British cruisers of the three German east African mail steamers *Bundesrath*, *General*, and *Herzog*.

The first case was that of the *Bundesrath*. As early as Dec. 5, 1899, Rear Admiral Sir R. Harris reported that that vessel had sailed from Aden for Delagoa Bay; that "ammunition" was "suspected, but none ascertained;" and that she carried "twenty Dutch and Germans and two supposed Boers, three Germans and two Austrians, believed to be officers, all believed to be intending combatants, although shown as civilians; also twenty-four Portuguese soldiers."[2] On the 29th of December she arrived at Durban in charge of the British cruiser *Magicienne*. The German Government requested her release on the ground, among others, of "positive assurances" given by the Hamburg Company that she carried no contraband. Lord Salisbury replied that she "was suspected to be carrying ammunition in her cargo, and that she had on board a number of passengers believed to be volunteers for service with the Boers," but that no details as to the grounds of the seizure had been received. Subsequently the British Government was advised by Admiral Harris that the ship changed the

[1] The Atalanta (1808), 6 C. Rob., 440, 458.

[2] Africa, No. 1 (1900), 1.

position of her cargo on being chased: that a partial search had revealed some sugar consigned to a person at Delagoa Bay, and some railway sleepers and small trucks consigned to a firm at the same place, but labelled Johannesburg; and that a further search was expected to disclose "arms among baggage of Germans on board, who state openly they are going to the Transvaal." The German Government declared that it had no knowledge of more than two officers having proceeded to the Transvaal, where they were unable to obtain commands. On Jan. 3, 1900, the British Government directed that an application be made to the prize court for the release of the mails; that, if the application should be granted, they be handed over to the German consul, to be hastened to their destination by a British cruiser if available, or by mail steamer, or otherwise; and that every facility for proceeding to his destination should be afforded "to any passenger whom the court considers innocent." The search of the steamer was continued for nine days, but no contraband was found. Jan. 5 the mails and passengers were released by order of the prize court, and were taken on board the German war ship *Condor* for Delagoa Bay. The steamer and her cargo was discharged on the 18th of January.

Dec. 16, 1899, the Admiralty communicated to the foreign office two telegrams, one from the commander in chief of the Mediterranean Station, and the other from the commander in chief at the Cape of Good Hope, in relation to the *Herzog*. One of the telegrams conveyed a report that this steamer, though she had declared that there were no troops on board, had left the Suez Canal for South Africa with "a considerable number of male passengers, many in khaki, apparently soldiers;" the other spoke of "a number of passengers dressed in khaki," and asked whether they could be legally removed. Dec. 21 the senior naval officer at Aden reported her as having sailed on the 18th for Delagoa Bay "conveying, probably for service in [the] Transvaal, about forty Dutch and German medical and other officers and nurses." Jan. 1, 1900, the Admiralty telegraphed to Admiral Harris: "Neither the *Herzog* nor any other German mail steamer should be arrested on

suspicion only until it becomes obvious that the *Bundesrath* is carrying contraband." The *Herzog* was brought into Durban on the 6th of January. It seems that she had among her passengers three Red Cross expeditions, one of which, however, had no official character nor any connection with the regular Red Cross societies. Jan. 7 the Admiralty directed her immediate release unless guns or ammunition were revealed by the summary search. To this there was added next day the further proviso, "unless provisions on board are destined for the enemy's government or agents, and are also for the supply of troops or are specially adapted for use as rations for troops." The steamer was released on the 9th of January.

Jan. 4, 1900, the senior naval officer at Aden reported that the steamer *General* was detained "on strong suspicion" and was undergoing search. The German Government protested, and asked that explicit instructions be given to British officers "to respect the rules of international law, and to place no further impediments in the way of the trade between neutrals"—a request to the form and imputations of which the British Government strongly excepted. The Admiralty had previously telegraphed to Aden that it was undesirable to detain the steamer if she carried the mails. It appears that she was detained on "information" that various suspicious articles were on board for Delagoa Bay, including boxes of ammunition stowed in the main hold, buried under reserve coal. The manifest contained several large cases of rifle ammunition for Mauser, Mannlicher, and sporting rifles, consigned to Mombasa, but this consignment was believed to be *bona fide*. After a search, which included the removal of 1,200 tons of cargo and the digging out of a large quantity of coal—a task which occupied the *Marathon's* ship's company, assisted by 100 coolies, several days—no contraband was found. The British Government ordered the vessel's release on the 7th of January, but, as time was requisite for the replacement of the 1,200 tons of cargo which had then been removed, she was unable to sail till the 10th. She had on board a considerable number of Dutch and German passengers for the

Transvaal, in plain clothes, but "of military appearance," some of whom were believed to be trained artillerymen, though it was stated by the British officials that proof of this suspicion could be obtained only by searching their baggage. Lord Salisbury afterwards stated that "there was no sufficient evidence as to their destination to justify further action on the part of the officers conducting the search."

With the release of the ships and their passengers and cargoes, and an expression of regret by Great Britain for what had occurred, the subject in controversy was arranged as follows:

1. The British Government admitted in principle the obligation to make compensation, and expressed its readiness to arbitrate the claims should an agreement by other means be impracticable.

2. Instructions were issued to prevent the stopping and searching of vessels at Aden or at any point equally or more distant from the seat of war.

3. It was agreed provisionally, till another arrangement should be made, that German mail steamers should not in future be searched on "suspicion only." By a mail steamer, however, was understood not every steamer that had a bag of letters on board, but a steamer flying the German mail flag.

On the other hand, the German Government substantially modified its original position with regard to the questions of international law involved. In a note to Lord Salisbury, of January 4, 1900, Count Hatzfeldt, German ambassador at London, declared it to be the opinion of his Government that prize proceedings in the case of the *Bundesrath* were not justified, for the reason that, no matter what may have been on board, "there could have been no contraband of war, since, according to recognized principles of international law, there can not be contraband of war in trade between neutral ports." He also declared this to be the view taken by the British Government in 1863 as against the judgment of the American prize court in the case of the *Springbok;* and by the British Admiralty in the Manual of Naval Prize Law, in 1866.

Lord Salisbury, in his reply of the 10th of January, pointed out the error of the German Government as to the case of the *Springbok*. As to the Manual of Naval Prize Law, he declared that, while its directions were for practical purposes sufficient for wars such as Great Britain had waged in the past, they were "quite inapplicable to the case which has now arisen of war with an inland state, whose only communication with the sea is over a few miles of railway to a neutral port." He also adverted to the fact that the author of the Manual, in another part of the work than that cited, had discussed "the question of destination of the cargo, as distinguished from destination of the vessel, in a manner by no means favorable to the contention advanced in Count Hatzfeldt's note," and that Professor Holland, who edited a revised edition of the Manual in 1888, had, in a recent letter in *The Times*, expressed an opinion altogether inconsistent with that which the German Government had endeavored to found on its words. Lord Salisbury stated that, in the opinion of Her Majesty's Government, the passage cited from the Manual, "that the destination of the vessel is conclusive as to the destination of the goods on board," could not apply to "contraband on board of a neutral vessel if such contraband was at the time of seizure consigned or intended to be delivered to an agent of the enemy at a neutral port, or, in fact, destined for the enemy's country," and that the true view in regard to such goods, as Her Majesty's Government believed, was correctly stated by Bluntschli, as follows: "If the ships or goods are sent to the destination of a neutral port only the better to come to the aid of the enemy, there will be contraband of war and confiscation will be justified."[1]

In his speech in the Reichstag, January 19, 1900, announcing the arrangement with Great Britain, Count von Bülow laid down certain propositions as constituting a system of law which should be operative in practice, and a disregard of which would constitute a breach of international treaties and customs. One of these propositions was that by the

[1] Si les navires ou marchandises ne sont expédiés à destination d'un port neutre que pour mieux venir en aide à l'ennemi il y aura contrebande de guerre et la confiscation sera justifiée. (Droit Int. Codifié, ed. 1874, § 813.)

term *contraband of war* "only such articles or persons are to be understood as are suited for war, and at the same time are destined for one of the belligerents." Count von Bülow added that the Imperial Government had striven from the outset to induce the English Government, in dealing with neutral vessels consigned to Delagoa Bay, "to adhere to that theory of international law which guarantees the greatest security to commerce and industry, and which finds expression in the principle that, for ships consigned from neutral states to a neutral port, the notion of contraband of war simply does not exist. To this the English Government demurred. We have reserved to ourselves the right of raising the question in the future, in the first place, because it was essential to us to arrive at an expeditious solution of the pending difficulty, and, secondly, because, in point of fact, the principle here set up by us has not yet met with universal recognition in theory and practice."

IV. *Delagoa Bay: American cases.*—Contemporaneously with the British-German controversy, a question arose between the United States and Great Britain as to the seizure of various articles shipped at New York, some of them on regular monthly orders, by American merchants and manufacturers on the vessels *Beatrice*, *Maria*, and *Mashona*, which were seized by British cruisers while on the way to Delagoa Bay. These articles consisted chiefly of flour, canned meats, and other food stuffs, but also embraced lumber, hardware, and various miscellaneous articles, as well as quantities of lubricating oil, which were consigned partly to the Netherlands South African Railway, in the Transvaal, and partly to the Lourenço Marques Railway, a Portuguese concern. It was at first supposed that the seizures were made on the ground of contraband, and with reference to this possibility the Government of the United States declared that it could not recognize their validity "under any belligerent right of capture of provisions and other goods shipped by American citizens in ordinary course of trade to a neutral port."[1]

It soon transpired, however, that the *Beatrice* and

[1] Mr. Hay, Sec. of State, to Mr. Choate, ambassador at London, tel., Jan. 2, 1900, S. Doc. 173, 56 Cong., 1 sess., 13–14.

Mashona, which were British ships, and the *Maria*, which, though a Dutch ship, was at first supposed to be British,[1] were arrested for violating a municipal regulation forbidding British subjects to trade with the enemy, the alleged offense consisting in the transportation of goods destined to the enemy's territory. The seizure of the cargoes was declared to be only incidental to the seizure of the ships. As to certain articles, however (particularly the oil consigned to the Netherlands South African Railway in the Transvaal), an allegation of enemy's property was made; but no question of contraband was raised and it was eventually agreed that the United States consul-general at Cape Town should arrange with Sir Alfred Milner, the British high commissioner, for the release or purchase by the British Government of any American-owned goods, which, if purchased, were to be paid for at the price they would have brought at the port of destination at the time they would have arrived there in case the voyage had not been interrupted.[2]

In the course of the correspondence Lord Salisbury thus defined the position of Her Majesty's Government on the question of contraband:

"Foodstuffs, with a hostile destination, can be considered contraband of war only if they are supplies for the enemy's forces. It is not sufficient that they are capable of being so used; it must be shown that this was in fact their destination at the time of seizure."[3]

Mr. Thomas Gibson Bowles, in a letter in the London *Times*, January 4, 1900, says: "In July, 1896, the Dutch steamer *Doelwijk* took a cargo of arms and ammunition, destined to Abyssinia, then at war with Italy, from the neutral port of Rotterdam to the neutral (French) port of Jibutil, in the Gulf of Tajura. The steamer being captured by the Italian cruiser *Etna* and brought in for adjudication, was condemned as lawful prize by the prize court at Rome on December 8, 1896."[4]

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[1] S. Doc. 173, 56 Cong., 1 sess., 16.

[2] Mr. Hay, Sec. of State, to Mr. Toomey, March 2, 1900; to the Ballard & Ballard Co., March 9, 1900; to Mr. Newman, March 13, 1900: 243 MS. Dom. Let., 317, 412, 488.

[3] S. Doc. 173, 56 Cong., 1 sess., 29.

[4] S. Doc. 173, 56 Cong., 1 sess., 21–22.